Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

DAVID GILCHRIST

Petitioner

vs.

KIRK V. KARMAN, husband, NANCY ROBINSON, wife; NICHOLAS WALLWORK, husband, ALICE WALLWORK, wife; JACQUELINE N. SCHESNOL, a single woman

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in denying Petitioner's motion for summary judgment under the *ex post facto* and Due Process clauses?

2. May lower courts rely on unpublished case law, to the exclusion of Constitutional rules of law, acts of Congress, and published decisions of this Court?

3. Do federal judges ever abstain in favor of patently unconstitutional state action?

4. Should the trial judge have been recused?

5. Does Arizona's immunity statute violate the Equal Protection Clause?

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BASIS FOR JURISDICTION

This action arises under the Constitution of the United States, and is brought pursuant to 42 U.S.C. § 1983. The District Court had original jurisdiction over Petitioner's federal question claims under 28 U.S.C. §§ 1331, 1343, and original jurisdiction over Petitioner's diversity claims under 28 U.S.C. § 1332. The District Court entered its final judgment on August 5, 2002. Petitioner filed his Notice of Appeal on August 13, 2002. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit entered its judgment on June 17, 2003. This Court has jurisdiction to review the judgments below under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The *Ex Post Facto* Clause, Article I, § 10, Constitution of the United States.

The First Amendment of the Constitution of the United States.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States.

42 U.S.C. § 1983.

E.R. 1.15, Rule 42, Ariz.R.S.Ct.

Rule 54(l), Ariz.R.S.Ct.

STATEMENT OF THE CASE

Plaintiff is a lawyer. In 1994, Plaintiff was practicing law in Arizona, and entered a fee contract with a lien securing payment. In 1994, Arizona had no written law barring liens in fee contracts.

Lawyers possess specialized training that gives them the power and temptation to manipulate the American justice system for their own ends. *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466, 489 (1988)(O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.).

Defendants Karman Wallwork and Schesnol are three of Arizona's "bar counsel," trusted to police the ethical integrity of Arizona's 15,000 active lawyers. In 1999 Defendants convicted Plaintiff of violating Arizona's trust account rule:

> "By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15."

Appendix, p. 21, 27.

Defendants' skipped the text and title of E.R. 1.15 for a reason.

I. E.R. 1.15, *circa* 1994.

In 1994, E.R. 1.15 had nothing to say about liens in fee contracts. It read as follows:

E.R. 1.15 SAFEKEEPING PROPERTY.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which

> both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

E.R. 1.15, Ariz.R.S.Ct.

As it was written in 1994, E.R. 1.15 only applied to lawyers entrusted with property for safekeeping.

2. E.R. 1.15, *circa* 1999.

In 1999 Defendants Karman Wallwork and Schesnol convicted Plaintiff of violating E.R. 1.15, Safekeeping Property. They did so by discarding the cardinal rule of statutory construction, and the text and title of E.R. 1.15:

> You and Mr. Dieterle signed a fee agreement which included a provision for a lien over the entire settlement of his claim. However, at the time the agreement was signed the amount of your legal fees was not quantifiable nor could you determine what, if any, settlement would be reached. Once your client's case settled you were entitled to a portion of that settlement; the portion equal to your actual fees. As you are undoubtedly aware, your client disputed the amount you ultimately claimed as your fee. In an effort to secure your fee without addressing Mr. Dieterle's concerns, you orchestrated a plan which would prevent the client from ever receiving any portion of his funds without first

> paying your fee. By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15.

Appendix, pp. 20-21, 26-27.

Defendants' 1999 reconstruction of E.R. 1.15 bears little resemblance to the written rule of law in force in 1994. Defendants' expanded version uses the word "lien" twice, while the real E.R. 1.15 does not address liens at all. The real E.R. 1.15 uses the word "property" 10 times, while Defendants' after-the-fact version never does. Defendants' version includes 13 instances of the words "you" and "your," while E.R. 1.15 contains none. Perhaps because they have so little in common, Defendants' revisionist legislation only mentions the real E.R. 1.15 once, and then without the title or authoritative text of the statute itself.

Defendants' 1999 'anti-lien' legislation did not become legible to any human eye until five years after Plaintiff's 1994 contract and lien. Defendants' law was therefore written five years after-the-fact.

ARGUMENT

1. Did the trial court err in denying Plaintiff's motion for summary judgment under the *ex post facto* and Due Process clauses?

A. The *ex post facto* clause.

Defendants' after-the-fact method of law enforcement has been repugnant to core American values for a long time. James Madison called *ex post facto* bills quintessentially antisocial:

> Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation.

James Madison, Federalist No. 44, Restrictions on the Authority of the Several States From the New York Packet. Friday, January 25, 1788. (Emphasis added).

Alexander Hamilton called the *ex post facto* method a perennial and favorite tool of tyrants:

> The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.

Alexander Hamilton, Federalist No. 84, Certain General and

Miscellaneous Objections to the Constitution Considered and Answered; From McLEAN's Edition, New York, May 28, 1788. (Emphasis added).

The Federalist Papers were highly influential,[1] and led to the ratification of the United States Constitution in 1788. From then on, every state in the Union was forbidden from using the *ex post facto* method:

> Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver ~~coin a~~ tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Article I, § 10, United States Constitution. (Emphasis added).

This Court says that the *ex post facto* clause was designed to serve fundamental justice, and to give fair warning so the citizenry could rely on legislative enactments until explicitly changed. *Carmell v. Texas*, 529 U.S. 513 (2000), citing *Miller v. Florida*, 482 U.S. 423, 430 (1987). And throughout its history, this Court has condemned the *ex post facto* methodology: "[L]aws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Ogden v. Saunders*, 12 Wheat. 213, 266 (1827). "In each instance, the government refuses, after-the-fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an

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[1] Chief Justice John Marshall said of the Federalist papers: "No tribute can be paid to them which exceeds their merit" *McCulloch v. Maryland*, 17 U.S. 316 (1819).

easier conviction." *Carmell v. Texas*, 529 U.S. 513 (2000).

1999 came after 1994 by half a decade. Defendants cheated Plaintiff out of five years of fair warning, and manipulated state law in a manner condemned by the universal sentence of civilized man. Defendants' retroactive state action violates the *ex post facto* clause of the Constitution of the United States absolutely, and as a matter of law.

The first canon of statutory construction is obvious: "Read the statute."[2] This cannon appears to have no practical value in the Ninth Circuit.

The trial judge skipped the *ex post facto* clause as a matter of policy: "Because the court concludes that it has no jurisdiction to consider the plaintiff's claims, it is axiomatic that it may not reach the merits of any of the plaintiff's claims, including his federal constitutional claims." Appendix, p. 7, n. 3. The Ninth Circuit did likewise in a two page memo, roughly half of which was consumed by the caption. For their part, Arizona's ethical leaders swapped the Constitutional rule of law for Illinois case law,[3] which they cited for the proposition that Arizona's legal ethics laws are not penal. Defendants' Ninth Circuit brief, p. 20.

Actually, bar disciplinary proceedings are not just penal, they are quasi-criminal. *See In re Ruffalo*, 390 U.S. 544,

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[2] "The first canon of statutory construction is obvious: 'Read the statute.'" Justice John Paul Stevens, The Shakespeare Canon of Statutory Construction, University of Pennsylvania Law Review (v.140: no. 4, April 1992).

[3] How *state case law* can overwrite a federal law written at a Constitutional Convention is unclear.

551 (1968), reh'g denied, 391 U.S. 961; *In Re Wilson*, 106 Ariz. 34, 470 P.2d 441, 442 (1970). And in Arizona, discipline and penalties account for Rules 46-68, of the Arizona Supreme Court.

The text of the *ex post facto* clause makes no distinction between criminal and quasi-criminal penal laws. Neither does the United Nations,[4] or this Court.[5] The *ex post facto* clause bars any law which imposes a penalty for an act innocent when done. *See United States v. Arzate-Nunez*, 18 F.3d 730, 733 (9th Cir. 1994). Defendants fined Plaintiff, and have had him on probation for the past four years. Fines and probation are penalties, not perquisites.

In summary, Defendants' 1999 law banning liens in fee contracts came five years after Plaintiff's 1994 contract. Writing and enforcing a new penal law five years after-the-fact violates the *ex post facto* clause in Article I, § 10 of the United States Constitution. It is also the polar opposite of American Due Process.

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[4] "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Universal Declaration of Human Rights, Preamble and Article 11, § 2 (1948).

[5] "In each instance, the government refuses, after-the-fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction." *Carmell v. Texas*, 529 U.S. 513 (2000).

B. The Due Process clause.

The Due Process clause says: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Fourteenth Amendment, Constitution of the United States. In 1950, this Court elaborated on the American principle of Due Process:

> It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just.

Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting).

It would seem self-evident that a legal weapon condemned by the universal sentence of civilized man would also offend America's deepest notions of what is fair and right and just. Laws written after-the-fact are written to order; tailored with 20-20 hindsight, to precisely match the respondent's undeniable, and previously legal conduct. The respondent's factual 'guilt' is a legal certainty. For practical purposes, the accused receives the impossible burden of proving himself innocent, of something he clearly did, back when it used to be legal. Procedural protests are treated as "remorselessness." (Verified Complaint, Dkt. 1, para. 49) The *ex post facto* is a perennial favorite for tyrants because it is impossible to defend.

American due process requires warning before-the-fact. By definition, the *ex post facto* method gives no warning until after-the-fact. The *ex post facto* law is therefore the polar opposite of due process.

While dodging the text and purpose of the Due Process clause before the Ninth Circuit, Arizona's legal leaders[6] found time to make a joke out the American doctrine of strict construction:

> Implicit in Plaintiff's insistence upon "strict construction" is the notion that the text of a statute, and nothing more, informs its application. This is nonsensical. Every law student, Plaintiff included, quickly learns that statutory interpretation, whether the statute is characterized as criminal, remedial or in any other way, is often informed by the use of materials extrinsic to the statute itself, including legislative history, references to dictionary definitions of terms, and the reviser's notes, as well as the history of a statute showing its revisions and their purposes. Every law student, Plaintiff included, necessarily learns that the judicial interpretation given statutes is often dispositive of the meaning attached to a statute, and is often far more important than the text of the statute itself.

Defendants' Ninth Circuit brief, p. 14.

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[6] Since violating the federal Constitution, Arizona ethics lawyers Karman and Wallwork have both been made President of the Bar of Arizona Appendix. pp. 45-49.

Defendants' legal satire confounds the American form of government, the difference between laws that give and laws that take, the Preamble to the state regulatory laws at issue,[7] the cardinal rule of statutory construction, and a large body of United States Supreme Court precedent.

It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties, and in favor of the persons on whom penalties are sought to be imposed. *See e.g. United States v. Fruit Growers Ex. Co.*, 279 U.S. 363, 369 (1929); *Busic v. United States*, 446 U.S. 398, 407 (1980). "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 5 Wheat (18 U.S.) 76, 93 (1820).

Bar disciplinary proceedings are quasi-criminal in nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968), reh'g denied, 391 U.S. 961; *In Re Wilson*, 106 Ariz. 34, 470 P.2d 441, 442 (1970). Respondents are therefore entitled to procedural due process, *In re Hoover*, 155 Ariz. 192, 745 P.2d 939, 943 (1987), and disciplinary rules must be read strictly, resolving any ambiguity in favor of the person charged. *U.S. v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988).

Far from construing E.R. 1.15 strictly, Defendants rewrote it entirely,[8] five years after-the-fact. Defendants' open

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[7] "The comments are intended as guides to interpretation, but the text of each rule is authoritative." Rule 42, Ariz.R.S.Ct., Preamble, Scope.

[8] If it were actually law, Defendants' 1999 version of E.R. 1.15 would need both a new title, and a new subsection

mockery of the doctrine of due process and strict construction would not stand the law school laugh test. In the Ninth Circuit, it doesn't have to. The lower courts both skipped the Constitutional rule of law, in favor of their own unpublished case law.

The trial court erred in denying Plaintiff's motion for summary judgment on his claims arising under the *ex post facto* and Due Process clauses of the Constitution of the United States.

2. May lower courts rely on unpublished case law, to the exclusion of Constitutional rules of law, acts of Congress, and published decisions of this Court?

America's highest laws are published in the Constitution of the United States. Acts of Congress are published in the United States Code. This Court's decisions are published in three different reporter systems.

In place of the top three tiers of America's published laws, the trial judge substituted a pair of unpublished lower court decisions; one by the Ninth Circuit, and one by himself.

(d):

E.R. 1.15 SAFEKEEPING PROPERTY; *ATTORNEY LIENS*

(a) *(no change)*

(b) *(no change)*

(c) *(no change)*

(d) A lawyer shall not enter into an agreement for services that contains a lien securing payment.

A. Unpublished Ninth Circuit decisions.

Unpublished Ninth Circuit decisions are written by law clerks, not Article III judges.[9] While the Ninth Circuit says its "memdispos" should not be cited as precedent by lawyers or judges in the Ninth Circuit,[10] they all do it anyway. The trial court skipped the Constitutional rule of law, and treated an unsigned, unpublished Ninth Circuit memo as 'blinding'[11] legal precedent.

B. Unpublished District Court decisions.

If unpublished decisions bearing the names of three

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[9] *See* PLEASE DON'T CITE THIS!, Alex Kozinski and Stephen Reinhardt, California Lawyer, June 2000. Appendix, pp. 39-44.

[10] "CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS: (a) Not Precedent : Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel. (b) Citation : Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit, except in the following circumstances." Rule 36-3. None of the exceptional circumstances apply here, but Rule 36-3 is reproduced in its entirety at Appendix, pp. 35-36.

[11] Judicial precedents have traditionally been labeled "persuasive" or "binding," with the difference depending on the two courts involved, and the facts of the two cases. The trial judge skipped the facts, skipped the law, and took "judicial notice," of an unsigned, publically unseen memo, written by a clerk, at the most reversed circuit in the nation.

Article III judges are unreliable as precedent, one wonders why an unpublished decision bearing only one judge's name would be more reliable. Unburdened by logic or legal analysis, the trial court simply took "judicial notice" of his own prior unpublished work. Appendix, p. 6-7, n. 2.

By choosing to follow his own unpublished work instead of the Constitution of the United States, the trial court reduced the judgments issuing from the Sandra Day O'Connor Courthouse to a procession of narcissistic legal lemmings, blindly following the sound of their own voice, without a trace of rational thought.

Two hundred years ago, applying the Constitutional rule of law in a case arising thereunder was considered "the very essence of judicial duty." *Marbury v. Madison*, 1 Cranch 137 (1803). These days, federal judges routinely swap unpublished legal memos for laws ratified by three quarters of the nation. If Chief Justice John Marshall's operator's manual for the federal judiciary has become an anachronism, then this Court should say so, publically. The tide is low, and people have a right to know.

3. Do federal judges ever abstain in favor of patently unconstitutional state action?

There is no abstention clause in the Constitution of the United States. There never has been. There is however a clause requiring judicial officers to support the Constitution:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.

Article VI, § 3, Constitution of the United States.

There is no federal abstention statute, and never has been. Congress has however passed a statute requiring federal judges to support and defend the Constitution of the United States:

> An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic . . ..

5 U.S.C. § 3331.

Abstention is a judge-made procedural doctrine. *Parrington*, *Rooker-Feldman*, *Younger, etc.* are case decisions. If federal judges may swap procedural case law for the very essence of the Constitution they swear to support and defend,

their oaths become meaningless, as do the rules in the Constitution itself. The abstention case law doctrine is not supposed to overwrite America's highest laws:

> The principles of abstention under which a federal court must refrain from interfering in certain state proceedings, for reasons of federalism and comity, do not apply in those cases where the state proceeding is motivated by a desire to harass, or is in bad faith, or where a statute challenged in the action is flagrantly and patently vocative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

Moore v. Sims, 442 U.S. 415, 424 (1979), *citing Huffman v. Pursue*, 420 U.S. 592, 611 (1969), *reh'g denied* 421 U.S. 971 (emphasis added).

Defendants wrote their own 'anti-lien' version of E.R. 1.15 five years after-the-fact. *Ex post facto* laws are "flagrantly and patently vocative of express constitutional prohibitions," specifically, the *ex post facto* and Due Process clauses discussed at length in Section 1 above.

Ex post facto laws are also patently unconstitutional "in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *See Ogden v. Saunders*, 12 Wheat. 213, 266 (1827)("[L]aws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man.").

When federal citizens use state government in a manner expressly forbidden by the plain text of our nation's paramount

law, federal judges are not supposed to look the other way. If they are going to anyway, perhaps they should muster the fortitude to do so publically. Abstention in favor of patently unconstitutional state action is comparable to a surgeon walking away from the table, so the cancer and the patient can work it out on their own. It is a cop, that doesn't want to get involved in crime.

While abstaining in favor of a form of government that James Madison called contrary to the first principles of the social compact, the trial court complained that Plaintiff's *ex post facto* claims were "inextricably intertwined with the underlying state court decision." There is no *ex post facto* case in which the *ex post facto* claim is <u>not</u> intertwined with the underlying retroactive state action; the retroactive state process is the very source of the constitutional violation. Ignoring the retroactive state process in an *ex post facto* case is like ignoring the crime in a criminal case. Constitutional claims are always inextricably interwoven with the underlying state action from which they arise. That is true whether the state action violates the *ex post facto* clause, Due Process, Equal Protection, Free Speech, strict construction, *etc.*

By abstaining in favor of patently unconstitutional state action, the trial court also abstained in favor of a form of state action that is legally "null and void." Throughout American history, acts repugnant to the Constitution have been considered null and void.[12] Defendants' state action is

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[12] *E.g.*, "A law violating a constitution established by the people themselves, would be considered by the Judges as null and void." James Madison, 2 Farrand, The Records of the Federal Convention of 1787, 93, note 23. "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be

repugnant to the Constitution, and therefore legally null and void. Federal judges who abstain in favor of the null and void make a farce of federalism.

The trial court punctuated his farce by violating a cluster of abstention rules. For example, abstention is precluded where the state tribunal is acting beyond its authority. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994), *cert. denied*, 133 L.Ed.2d 203. Defendants' legal process began and continued in violation of their own jurisdictional mandate.[13] This is in part a First Amendment case, involving an *ex post facto* quasi-criminal process, in which speech was both forced and abridged. (Verified Complaint, Dkt. 1, paras. 95-100). Abstention is particularly inappropriate in First Amendment cases. See *Yniguez v. Mofford*, 730 F.Supp. 309, 316 (D.Ariz. 1990), reversed on other grounds, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated and remanded, Arizonans for Off. Eng. v. Arizona*, 137 L.Ed 2d 170 (1997). *See also Ripplinger v. Collins*, 868 F.2d 1043, 1056 (9th Cir. 1989).

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essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Marbury v. Madison*, 1 Cranch 137 (1803).

[13] Verified complaint, Dkt. 1, paras. 50-52, 72-74. *See also* "Bar counsel shall investigate all information coming to the attention of the state bar which, if true, would be grounds for discipline or transfer to disability inactive status." Rule 49 (c)(1), Ariz.R.S.Ct. "If the allegations, if true, would not constitute misconduct or incapacity, under these rules, the matter shall be dismissed, but may be referred to the peer review committee." Rule 53(b)(1), Ariz.R.S.Ct.

Even where all the requirements for federal abstention are met, abstention is inappropriate where bad-faith prosecution or harassment is present, *Lebbos v. Judges of Superior Court*, 883 F.2d 810, 814 (9th Cir. 1989), and where the state tribunal is incompetent by reason of bias. See *Gibson v. Berryhill*, 411 U.S. 564, -577-79 (1973); *Hirsh v. Justices of Supreme Court of California*, 67 F.3d 708, 713-15 (9th Cir. 1995). The *ex post facto* law is tyranny's timeless calling card, and perhaps the world's best documented example of bad-faith harassment and bias.

Abstaining in favor of the best known government abuses is standing down, when the federal bench is most expected to stand firm, and put the Constitution into practical effect. Abstention in favor of retroactive state action makes the *ex post facto* clause an American first principle with absolutely no practical meaning, and disregards the very purpose of § 1983:

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of law, 'whether that action be executive, legislative or judicial.'

Mitchum v. Foster, 407 U.S. 225, 242 (1972).

The trial court erred in abstaining in favor of Defendants' patently unconstitutional, retroactive state action.

4. Should the trial judge have been recused?

This case was originally assigned to the Honorable John W. Sedwick, a federal judge from Alaska who was visiting the

District of Arizona. Defendants' first act was to steer the case to a fellow Arizona attorney. Defendants filed a motion to transfer, gave Judge Rosenblatt a copy, and skipped Judge Sedwick. Defendants told Judge Rosenblatt that his "familiarity with both the case law governing such matters, and his earlier handling of the prior case will enable him to dispose of the new action and avoid substantial duplication of judicial effort."[14] They were right about the effort.

While this Court once called applying the constitutional rule of law "the very essence of judicial duty," the trial judge said otherwise: "Because the court concludes that it has no jurisdiction to consider the plaintiff's claims, it is axiomatic that it may not reach the merits of any of the plaintiff's claims, including his federal constitutional claims." Appendix, p. 7, n. 3.

Self-imposed constitutional ignorance should easily qualify as the kind of extreme legal favoritism that makes fair judgment of the legal issues impossible. *Liteky v. United States*, 510 U.S. 540, 555 (1994). In a case arising under the Constitution, fair judgment can never be rendered in a constitutional vacuum. And in the American federal judiciary, there can be no greater prejudice than that of a federal judge who has closed his eyes on the constitution.[15] A federal judge blind to the Constitution is not fit to serve as trier of law in a

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[14] Dkt. 7, Defendants' November 28, 2000 motion to transfer, p. 2, lines 12-14.

[15] "Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law." *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803).

case arising thereunder.

While ignoring the Constitution he is sworn to support and defend, the trial judge found time to threaten Plaintiff with Rule 11 sanctions,[16] for maintaining a case arising under the Constitution of the United States. The trial court also implied Plaintiff was violating unnamed ethical rules,[17] and allowed the Defendants to conceal subpoenaed documents relevant to their motion to dismiss.[18]

Plaintiff is "citizen of the United States," and this is a case arising under the Constitution of the United States. When they bring their social disputes to federal court, American citizens have a right to a detached, fair and impartial judge. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 779 (9th Cir. 1990). "What matters is not the reality of bias or prejudice, but its appearance." *U.S. ex. rel. Hochman v. Nackman*, 145 F.3d 1069, 1076 (9th Cir. 1998), citing 28 U.S.C. 455(a); *Liteky v. United States*, 510 U.S. 540 (1994). Judge Sedwick was a federal judge who was not a member of the same trade group as the Defendants and the trial judge. He should have decided the legal issues, and the constitutionally adverse Judge Rosenblatt should have been recused.

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[16] "But, take a hard look, Mr. Gilchrist. You're a hard man to convince, but there may well have to be Rule 11 sanctions if there is no substantial difference in these cases and the court ends up with the same ruling." Dkt. 25, Ex. 18.

[17] Dkt. 25, pp. 3-5.

[18] Plaintiff subpoenaed his ethics file from the State Bar of Arizona. Dkt. 25, pp. 10-13. The State Bar refused to provide anything other than what it styled "the public record portion" of the file, citing a state statute.

5. Does Arizona's immunity statute violate the Equal Protection Clause?

The trial court dismissed Plaintiff's diversity claims without comment. As a result, the trial court never read, addressed or applied the state immunity statute under which he gave the Defendants absolute immunity from Plaintiff's diversity[19] claims. Those who read the Arizona Supreme Court's Rule 54(l) will find a state statute that gives legal protection to everyone in a quasi-criminal state process, except the respondent:

> Immunity From Civil Suit. Communications to the court, state bar, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists or bar counsel relating to lawyer misconduct, lack of professionalism or disability and testimony given in the proceedings shall be absolutely privileged

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[19] "Conduct by persons acting under color of state law which is wrongful under 42 USC § 1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced." *Martinez v. California*, 444 U.S. 277, 284, n.8, (1980), *reh'g denied*, 445 U.S. 920. If valid, state Rule 54(l) would only immunize Defendants from Plaintiff's state based claims.

> conduct, and no civil action predicated thereon may be instituted against any complainant or witness. Members of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists, bar counsel and staff shall be immune from suit for any conduct in the course of their official duties.

Rule 54(l), Ariz.R.S.Ct. (Emphasis added).

Rule 54(l) is facially invalid, and represents a purposeful discrimination between classes of persons. Complainants and witnesses can speak freely, while Respondents cannot. The chilling effect on Plaintiff's unprotected speech in this case was anything but trivial.[20]

For anyone who reads it, the unequal protections of the Arizona Supreme Court's immunity rule are glaring. The trial court solved Rule 54(l)'s equal protection problems by not looking at it.

The Ninth Circuit did the same. It's two page memo contains no reference to Plaintiff's diversity claims, Rule 54(l), or the Equal Protection Clause it violates. These days, in the Ninth Circuit, the Constitutional rule of law literally does not rate an honorable mention.

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[20] Prior to their frivolous bar complaint, the highly litigious Dieterles had sued Respondent/Plaintiff for a non-existent cause of action, and accused him of libel and slander. (Verified Complaint, Dkt. 1, para. 16, 98).

CONCLUSION

Two hundred years ago, this Court decided *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803). In addition to laying the groundwork for judicial review, Chief Justice John Marshall's landmark decision had a good deal to say about the federal judiciary's relationship with the Constitution of the United States:

> Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
>
> . . .
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> . . .
>
> The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

Ought the judges to close their eyes on the constitution, and only see the law?

. . .

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as, according to the best of my abilities and understanding agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States if that constitution forms no rule for his government? If it is closed upon him, and

cannot be inspected by him?

> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

Marbury v. Madison, 1 Cranch 137 (U.S. 1803).

The trial court's unpublished 21st century answer to *Marbury v. Madision* was to skip the Constitutional rule of law, as a matter of policy: "Because the court concludes that it has no jurisdiction to consider the plaintiff's claims, it is axiomatic that it may not reach the merits of any of the plaintiff's claims, including his federal constitutional claims." Appendix, p. 7, n. 3.

Lawyers possess specialized training that gives them the power and temptation to manipulate the American justice system for their own ends. *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466, 489 (1988)(O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). The Defendants are three of Arizona's most ethical lawyers, trusted to police the integrity of Arizona's legal trade.

Left to their own devices,[21] Defendants Karman

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[21] "The State Bar is an arm of the Supreme Court in this state and I think that it is incumbent upon this court to exercise some degree of oversight with respect to its activities. That does not mean that we should micromanage its activities and we will not attempt to do that. It does mean that the court should pay attention to what is going on in that organization. I don't believe the court has ever really exercised a sufficient degree of oversight." Arizona Supreme Court Chief Justice Thomas A. Zlaket, Dkt. 9, Ex. 29.

Wallwork and Schesnol betrayed the public trust by joyriding with a critical office of state government, and misusing Arizona law in a retroactive form repugnant to the Constitution of the United States, and "condemned by the universal sentence of civilized man." *Ogden v. Saunders*, 12 Wheat. 213, 266 (1827).

The trial judge is an Arizona attorney too. When confronted with his colleagues' unconstitutional misuse of state government, the trial judge turned a blind eye, and abstained. He was affirmed by a clerk and a computer at the most reversed Circuit in the nation. The clerk may be a lawyer; the computer is not. Neither the clerk nor the computer is an Article III judge.

Over the course of two hundred years, the "very essence of judicial duty" has degraded to the very essence of judicial bureaucracy. The tide is low.

The writ should be granted.[22]

July 4, 2003.

DAVID GILCHRIST
210 Hauoli Street
Wailuku, Hawaii USA 96793
(808) 986-0908

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[22] "No nation can answer for perfect exactitude of proceedings in all their inferior courts. It suffices to provide a supreme judicature where all error and partiality will be ultimately corrected." –Thomas Jefferson to George Hammond, 1792. ME 16:255.

APPENDIX

FILED
JUN 17 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID GILCHRIST, Plaintiff-Appellant, v. KIRK V. KARMAN, husband; et.al. Defendants-Appellees.	No. 02-16609 D.C. No. CV00-01561-PGR MEMORANDUM[1]

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding
Submitted June 9, 2003[2]
Before: RYMER, THOMAS, and SILVERMAN, Circuit

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Judges.

David Gilchrist, an attorney, appeals pro se the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging that certain representatives of the State Bar of Arizona ("SBA") violated both his constitutional rights and Arizona law by concluding, after an investigation, that he withheld disputed funds from a client and refused to cooperate during the course of an ethics investigation. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for lack of subject matter jurisdiction. *Parrington v. Gedan*, 961 F.2d 852, 864 (9th Cir. 1992). We affirm.

The district court properly dismissed Gilchrist's action under the *Rooker-Feldman* doctrine because all of his claims were inextricably intertwined with the SBA's decision that he committed ethics violations. See id. at 864-65.

The district court did not abuse its discretion by denying Gilchrist's motion to recuse Judge Rosenblatt because adverse rulings alone generally do not support a finding of judicial bias. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1160-61 (9th Cir. 1999); *see also* 28 U.S.C. § 455(a).

Contrary to Gilchrist's contention, the district court did not violate Ninth Circuit Rule 36-3. See 9th Cir. R. 36-3(b)(ii); *see also Sorchini v. City of Covina*, 250 F.3d 706, 708 (9th Cir. 2001) (per curiam) (rule "permits the citation to an unpublished disposition where the very existence of the prior case is relevant as a *factual* matter to the case being briefed") (emphasis in original)).

Gilchrist's remaining contentions lack merit.

AFFIRMED.

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AUG 0 5 2002

CLERK UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
By s/DS DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Gilchrist,	) JUDGMENT IN A CIVIL
	) CASE
	)
Plaintiff,	) CV 00-1561-PHX-PGR
v.	)
	)
Kirk V. Karman, et. al.	)
	)
	)
Defendants	)
	-)

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court has granted

the Defendants' Motion to Dismiss to the extent that this action is dismissed in its entirety pursuant to Fed. R.Civ.P 12 (b) (1) for lack of subject matter jurisdiction. Therefore, the Plaintiff shall take nothing. This complaint and action are hereby dismissed.

August 5, 2002

RICHARD H. WEARE
District Court Executive/Clerk

s/Kathleen W. Garchey
(By) Deputy Clerk

cc: (all counsel)

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AUG 05 2002
CLERK UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
By s/DS DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Gilchrist,	)	
	)	
Plaintiff,	)	No. CV 00-1561 PHX PGR
v.	)	
	)	ORDER
Kirk V. Karman, et al.,	)	
	)	
	)	
Defendants	)	
	)	

Pending before the Court is Plaintiff's motion for summary judgment on his claims arising under the ex post facto and Due Process clauses of the Constitution of the United States (doc. #16) and Defendants' Cross-Motion to Dismiss (doc. #21). Having considered the parties' memoranda, the Court finds that this action should be dismissed in its entirety for lack of subject matter jurisdiction.

The plaintiff, a practicing attorney appearing pro se in this action, has sued three officials of the State Bar of Arizona, and their spouses, for the officials' actions in subjecting the

plaintiff to a State Bar disciplinary action.[1] The plaintiff's complaint raises federal civil rights claims pursuant to 42 U.S.C. § 1983, alleging that the disciplinary action violated the ex post facto and bill of attainder clauses of the Constitution, violated the plaintiff's First Amendment rights, and violated his 14th Amendment rights to due process and equal protection, and state law claims pursuant to diversity jurisdiction for defamation, abuse of process, and negligence; the complaint seeks nominal, compensatory and punitive damages, and unspecified declaratory and injunctive relief regarding Arizona Supreme Court Rules 49(c)(1), 51 (h) and (Rule 53 (b) (1), and Rule 54 (1).[2] The claims arise from a disciplinary investigation

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[1] The defendant officials are Kirk Karman, Nicholas Wallwork, and Jacqueline Schesnol.

[2] This action is in effect a continuation of an earlier action filed in this Court by the plaintiff arising from the same disciplinary action and alleging essentially the same claims. In the first action, Gilchrist v. Arizona Supreme Court, CV 99-0629 PHX PGR, the plaintiff sued the Arizona Supreme Court, the State Bar of Arizona, various State Bar officials, and a former client and the client's counsel. The Court entered an opinion on March 8, 2000 (doc. #58) that dismissed the first action in its entirety due to the jurisdictional bar of the Rooker-Feldman doctrine and, alternatively, on Younger abstention and on federal and state law immunity grounds. The Ninth Circuit affirmed that dismissal on appeal in an unpublished decision entered on March 12, 2001 in No. 00-15739, 10 Fed.Appx. 468, 2001 WL 294326.

Notwithstanding the plaintiff's apparent belief to the contrary, the Court notes that it may take judicial notice of its own unpublished opinion in the first action, In re Turner, 199 B.R. 694, 695 (9th Cir.BAP 1996)("[A] Court may take

and proceeding that was commenced against the plaintiff by the State Bar in June 1998 after it received an ethics complaint against the plaintiff concerning his conduct involving a fee dispute with a former client. The State Bar, through informal reprimand orders issued by defendant Karman on May 19, 1999 and defendant Wallwork on September 1, 1999, both of which were allegedly written by defendant Schesnol, concluded that plaintiff had violated ER 1.15 and placed him on probation, ordered him to attend a one-day ethics enhancement course, and to pay $300.00 in costs.

The defendants contend in part in their Cross-Motion to Dismiss, in an argument inexplicably ignored by the plaintiff, that this action should be dismissed pursuant to the Rooker Feldman doctrine. Since Rooker-Feldman is a jurisdictional doctrine, Olson Farms, Inc. v. Barbosa, 134 F.3d 933, 937 (9th Cir. 1998), it is the first issue that the Court must decide and, given the Court's conclusion that the doctrine is applicable to the entirety of this action, it is the only issue that the Court need decide.[3]

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judicial notice of its own opinions, whether published or not."), and may take judicial notice of the Ninth Circuit's unpublished decision in the first action pursuant to Ninth Circuit Rule 36-3(a) and (b) (i) and (ii).

[3] Because the Court concludes that it has no jurisdiction to consider the plaintiff's claims, it is axiomatic that it may not reach the merits of any of the plaintiff's claims, including his federal constitutional claims. As the Supreme Court has made clear, "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing that cause." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003 (1998)(quoting

Under the Rooker-Feldman doctrine, a federal district court does not have subject matter jurisdiction to review federal or state law claims, including federal constitutional challenges pursuant to 42 U.S.C. § 1983 seeking damages and injunctive or declaratory relief, that are inextricably intertwined with the underlying state court decision. Courts have consistently concluded that the Rooker-Feldman doctrine is generally applicable to collateral attacks on attorney disciplinary proceedings because such proceedings are generally judicial in nature. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 479, 103 S.Ct. 1303, 1313 (1983). Such proceedings are considered judicial in nature even if they just involve state bar proceedings. Nargy v. Dean, 32 F.3d 1521, 1525 (11th Cir. 1994)("The defendants correctly note that the Rooker-Feldman doctrine has been applied to state bar proceedings."); Samuel v. Michaud, 980 F.Supp. 1381, 1414 (D.Id. 1996), aff'd, 129 F.3d 127 (9th Cir. 1997)("[T]he court notes that the Rooker-Feldman doctrine applies here because the state bar is an arm of the state courts, and the state bar disciplinary hearing is judicial in nature and effect."). The doctrine applies to a state bar disciplinary decision notwithstanding that the highest state court has not issued a final decision on the matter.[4]

Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)). See also, Parrington v. Gedan, 961 F.2d 852, 865 (9th Cir. 1992)(The court noted that the Rooker-Feldman doctrine prevented it from considering the merits of an attorney's constitutional claims arising from disciplinary action taken against him.)

[4] There is nothing in the record of this action, nor in the record of the first action, that establishes that the plaintiff has made any attempt to challenge the State Bar's disciplinary sanction through any of the state's administrative or judicial appeal procedures.

Allstate Insurance Co, v. West Virginia State Bar, 233 F.3d 813, 816-17 and 820 (4th Cir. 2000)(Court, in rejecting an argument that a decision of a state bar committee was not the decision of a state court, concluded that the Rooker-Feldman doctrine precluded a challenge to a decision of the state bar's committee on unlawful practice of law); see also, Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986)(Court concluded that Rooker-Feldman doctrine applies where the state court decision under attack is not that of the state's highest court.) In short, the Rooker-Feldman doctrine has been rightly said to have "eliminate[d] most avenues of attack on attorney discipline." Johnson v. Supreme Court of Illinois, 165 F.3d 1140, 1141 (7th Cir.), cent. denied, 528 U.S. 916 (1999).

The Court concludes that the Rooker-Feldman doctrine is applicable to this action .[5] First, the Court accepts the

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[5] The Court notes that even were it to find that the Rooker Feldman doctrine is not applicable because the underlying State Bar disciplinary proceeding was still on-going at the time this action was commenced, it would still dismiss this action in its entirety on the alternative bases which it used to dismiss the plaintiff's first action, i.e. the Younger abstention doctrine, federal quasi-judicial and/or quasi-prosecutorial immunity, and state law immunity pursuant to Ariz.Sup.Ct.R. 54(1). Furthermore, even if the Court were to find that the plaintiff's reiterated challenge to the constitutionality of Ariz.Sup.Ct.R. 54(1) is a generalized challenge outside the scope of the Rooker-Feldman doctrine, the Court would conclude that the plaintiff's challenge is legally untenable given the fact that both this Court and the Ninth Circuit expressly found in the plaintiff's first action, wherein the plaintiff raised the same constitutional arguments concerning the rule, that the rule is constitutional.

plaintiff's position that the underlying State Bar disciplinary action against him has concluded.[6]

Second, that Court concludes that all of the plaintiff's federal claims and state claims are inextricably intertwined with a the underlying State Bar disciplinary proceeding. As the Ninth Circuit has made clear, "[i]f in order to resolve the claim, the district court would have to go beyond mere review of the state rule as promulgated, to an examination of the rule as applied by the state court to the particular factual circumstances of the plaintiff's case, then the court lacks jurisdiction." Worldwide Church of God, 805 F.2d at 892 (emphasis in original; internal quotation marks and brackets omitted). In this case, the Rooker-Feldman doctrine is implicated because it is clear from the plaintiff's complaint that he is challenging the manner in which the defendants interpreted and applied certain ethical and procedural rules in his disciplinary proceeding, e.g. their alleged "one-time expansion of E.R. 1.15", their alleged "manipulation of E.R. 8.4 (c)", their alleged violation of their own internal rules and the Rules of the Arizona Supreme Court, etc., and his allegations obviously call into question the propriety of the disciplinary sanction order. Simply put, a finding in the plaintiff's favor on any of his claims in this action, whether based on federal constitutional law or state law, would necessarily impugn the validity of the underlying disciplinary sanction order, and that is a result barred by the Rooker-Feldman doctrine. Therefore,

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[6] While the Court does not necessarily accept the plaintiff's contention that the underlying disciplinary action concluded on September 1, 1999 when the second informal order of reprimand was entered, there is nothing in the record before the Court that establishes that the disciplinary action is in fact still on-going.

IT IS ORDERED that the Plaintiff's motion for summary judgment on his claims arising under the ex post facto and Due Process clauses of the Constitution of the United States (doc. #16) is denied. IT IS FURTHER ORDERED that the defendants' Cross-Motion to Dismiss (doc. #16) is granted to the extent that this action is dismissed in its entirety pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. The Clerk of the Court shall enter judgment accordingly.

Dated this 5th day of August, 2002.

s/Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

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JULY 15 2002
CLERK UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
By s/DS DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Gilchrist, Plaintiff, v. Kirk V. Karman, et al., Defendants	)	No. CV 00-1561 PHX PGR **ORDER**

Pending before this Court is Plaintiffs Motion to Recuse the Honorable Paul G. Rosenblatt (Doc. #25).[1] Plaintiff claims this matter should be re-assigned because Judge Rosenblatt is not impartial and is biased against Plaintiff.

I. LEGAL STANDARD

[1] The Court notes that Plaintiff argues the merits of his case in part of the recusal motion. This Court has only undertaken to deal with the portion of the motion that relates specifically to the request to recuse Judge Rosenblatt.

Two statutes govern whether a federal judge must recuse in a particular case. 28 U.S.C. § 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely an sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144 (2002).

28 U.S.C. § 455 states:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself in the following circumstances: 1 Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts

concerning the proceeding; . . .[2]

28 U.S.C. § 455 (2002).

The Supreme Court has offered further guidance regarding when recusal is required: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S. at 583. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

United States v. Liteky, 510 U.S. 540, 555 (1994). Thus, the Supreme Court has made clear 26 that an extrajudicial source is typically required for recusal to be appropriate. *Id.* The only exception to the extrajudicial source requirement is when actions by the judge reveal a lack of impartiality so high that

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[2] The remaining portions of 28 U.S.C. § 455 are not at issue in this case.

fair judgment would be impossible. *Id.* Additionally, even when an extrajudicial source exists, the mere existence of an extra judicial source is not, in and of itself, sufficient to justify "bias or prejudice" recusal. *Id.* at 554. Finally, "[a]lso not subject to deprecatory characterization as `bias' or `prejudice' are opinions held by judges as a result of what they learned in earlier proceedings." *Id.* at 551.

Comments "*[n]ot* establishing bias or partiality ... are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune." *Id.* at 555-56.

The moving party bears the burden of proving facts sufficient to justify recusal. *Denardo v. Municipality of Anchorage,* 974 F.2d 1200,1201(9' Cir.1992). While the Court must accept the facts alleged as true, *Willenbring v. United States,* 306 F.2d 944, 946 (9th Cir. 1962), the Court will not base recusal on conclusory allegations. *United States v. $292, 888.04 US. Currency*, 54 F.3d 564, 566 (9th Cir. 1995).

II. DISCUSSION

Plaintiff claims that Judge Rosenblatt is biased against him. The Court has reviewed all of the facts cited by Plaintiff and the Court finds that none of the statements, orders, or actions of Judge Rosenblatt justifies recusal in this case. Specifically, Plaintiff claims that Judge Rosenblatt is biased against him because he directed Plaintiff to only contact counsel for Defendants instead of Defendants personally. Doc. #25 at 4-5. Clearly, this is a ruling within the case of the type

that can rarely justify recusal. Additionally, nothing in Judge Rosenblatt's order shows bias in favor of or against either party. Such order certainly does not rise to the level of Plaintiffs conclusory allegation that Judge Rosenblatt's order to Plaintiff shows Judge Rosenblatt believes Plaintiff is an "unethical lawyer."

Plaintiff also claims that Judge Rosenblatt is prejudiced against him because Judge Rosenblatt advised Plaintiff that if his current case is not substantially different from a previous case he filed, Plaintiff may be subject to Rule 11 sanctions. Doc. #25 at 5. Judge Rosenblatt's qualification of his statement with "if" clearly shows that Judge Rosenblatt had not prejudged the current case. Therefore, no prejudice or bias is shown.[3]

Plaintiff also alleges that Judge Rosenblatt's comments regarding potential Rule 11 sanctions shows that Judge Rosenblatt may intend to rely on an unpublished Ninth Circuit opinion, which, Plaintiff claims, shows a pro-defense bias. Doc. #25 at 7. Reliance on an opinion of the Court of Appeals does not show a bias in favor of either party. Additionally, as the Court noted in *Liteky*, if Judge Rosenblatt does rely on opinions

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[3] Though not directly relevant, Plaintiff complains that Judge Rosenblatt referred to Rule 11, which Plaintiff claims was pre judgment on Plaintiffs future response to Defendant's Motion to Dismiss. Doc. #25 at 5. Plaintiff s basis for this complaint is that Rule 11 only applies to signatures on pleadings, and thus Judge Rosenblatt's statement must have been referring to Plaintiff s to-be-filed response to the defense motion to dismiss. This Court assumes that Plaintiff signed his complaint, subject to Rule 11. Therefore, Plaintiff is mistaken that Judge Rosenblatt must have been referring to his to-be-filed response because Judge Rosenblatt could have been referring to the complaint.

formed in a prior proceeding, recusal would only be required if such reliance shows a deep-seated favoritism or antagonism that makes fair judgment impossible. There are no facts in this case to support any suggestion of favoritism or antagonism. Finally, and most importantly, Plaintiff does not allege that Judge Rosenblatt has actually relied on any prior proceeding yet. Plaintiff only speculates that Judge Rosenblatt may do so in the future. Clearly a party's speculation regarding what a Judge may do cannot form the basis for recusal.[4]

Plaintiff additionally makes some arguments regarding Judge Rosenblatt's order in a different case in which Plaintiff was a party. This Court does not sit as a court of appeals over Judge Rosenblatt, and will not consider the merits or substance of any of Judge Rosenblatt's prior orders. Plaintiff's entire argument focuses on what Plaintiff believes are legal errors. *See* Doc. #25 at 7-10. However, none of Plaintiff's arguments shows bias or prejudice. Accordingly, recusal is not required based on Judge Rosenblatt's orders issued in another case involving Plaintiff. Plaintiff goes on to argue that Judge Rosenblatt's order regarding the timing of discovery shows favoritism toward Defendants. Doc. #25 at 10-13. As indicated above, a court's ruling during a case typically can not form the basis of a recusal motion. Additionally, none of the facts alleged by Plaintiff (specifically that Judge Rosenblatt

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[4] Though not directly relevant, Plaintiff implies that Judge Rosenblatt intends to violate Circuit Rule 36-3 by citing an unpublished opinion. While Plaintiff is correct that Rule 36-3 generally prohibits the citation of unpublished opinions, the Rule has exceptions. Specifically, 36-3(b)(i) states that unpublished opinions can be cited for purposes of law of the case, *res judicata*, or collateral estoppel. Thus, to the extent any of these theories are applicable, citation to an unpublished opinion is appropriate.

decided to stay discovery until resolution of a motion to dismiss, which necessarily resulted in a stay of Plaintiff s pending subpoena) shows any bias or prejudice. Thus, recusal on this basis is not required.

In his reply, Plaintiff states, "Judge Rosenblatt's self-imposed constitutional ignorance more than qualifies as the kind of extreme legal favoritism that makes fair judgment of the legal issues impossible." Doc. #30 at 2. Clearly this is a request for this Court to review the substance and merits of Judge Rosenblatt's orders in a previously filed case. This is a matter for appeal, not for this Court. Further, Plaintiff has already availed himself of the opportunity to appeal the order in question. This is not a appropriate basis for a motion to recuse as it cites no actual bias or prejudice, only Plaintiffs disagreement with Judge Rosenblatt's legal analysis.

Plaintiff's additional allegation in his reply is that Judge Rosenblatt is applying the procedural rules differently between Plaintiff and Defendants. Doc. #30 at 4. Plaintiff has stated that when Defendants' moved to exceed the page limit in filing a motion, that request was immediately granted. Conversely, according to Plaintiff, when Plaintiff requested to exceed the page limit, no order was forthcoming (granting or denying the request).

This Court's independent review of the docket in this case shows that Plaintiff is correct. However, an important intervening circumstance occurred between Defendants' request and Plaintiffs request. The circumstance was that after Defendants' request was granted, but before Plaintiff made his request, Plaintiff advised Judge Rosenblatt that he intended to move for recusal. Since Plaintiff advised Judge Rosenblatt that he intended to move for recusal, the only order issued by Judge Rosenblatt was the Order referring the Motion to Recuse to the

undersigned Judge. Thus, the Court does not find that such action by Judge Rosenblatt shows anything but judicial impartiality.

Moreover, this Court is not the appropriate forum to review Judge Rosenblatt's decisions. This Court is only to consider whether there is a bias or prejudice against Plaintiff. This Court does not find that even if Judge Rosenblatt granted a request to exceed page limit quickly with respect to one party, but took longer to render a decision with respect to the other party that such action shows bias or prejudice sufficient to justify recusal.

III. CONCLUSION

Based on the foregoing, the Court has determined that neither 28 U.S.C. § 144 nor 28 U.S.C. § 455 require the recusal of Judge Rosenblatt in this case. Accordingly,

IT IS ORDERED that Plaintiff s Motion to Recuse Judge Rosenblatt (Doc. #25) is denied;

IT IS FURTHER ORDERED that Defendant's Motion to Strike Portions of Plaintiffs Motion to Recuse (Doc. #27) is denied as the Court has addressed any issues raised therein in footnote 1.

DATED this 12 day of July, 2002.

s/James A. Tielborg
James A. Tielborg
United States District Judge

FILED
MAY21 1999
STATE BAR OF ARIZONA
BY s/Elena Farris

BEFORE THE PROBABLE CAUSE PANELIST

OF THE STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 98-1005
	)	Frederick &
David J. Gilchrist,	)	Judy Dieterle
Bar No. 011492	)	
	)	ORDER OF
Respondent.	)	INFORMAL
	)	REPRIMAND,
	)	PROBATION
	)	AND COSTS

The undersigned Probable Cause Panelist of the State Bar, having reviewed this matter pursuant to Rule 53(b), Ariz.R.S.Ct., finds that probable cause exists to believe that respondent has violated Rule 42, Ariz.R.S.Ct., to wit:

You and Mr. Dieterle signed a fee agreement which included a provision for a lien over the entire settlement of his claim. However, at the time the agreement was signed the amount of your legal fees was not quantifiable nor could you determine what, if any, settlement would be reached. Once your client's case settled you were entitled to a portion of that settlement; the portion equal to your actual fees. As you are undoubtedly aware, your client disputed the amount you ultimately claimed as your fee. In an effort to secure your fee without addressing

Mr. Dieterle's concerns, you orchestrated a plan which would prevent the client from ever receiving any portion of his funds without first paying your fee. By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15.

IT IS THEREFORE ORDERED that:

(1) Pursuant to Rules 52(a)(5) and 53(b), Ariz.R.S.Ct., respondent is informally reprimanded for such conduct.

(2) Pursuant to Rules 52(a)(6) and 53(b), Ariz.R.S.Ct., respondent is hereby placed on probation under the following terms and conditions:

(a) Respondent shall attend a one-day Professional Enhancement Program and shall be responsible for the attendance fee. Respondent must contact Yigael M. Cohen, Director of Lawyer Regulation, State Bar of Arizona, (602) 340-7244, within 20 days from the date this order is mailed;

(b) The period of probation shall be in effect until such time as respondent has completed the one-day Professional Enhancement Program;

(c) Respondent shall report, in writing, his compliance with the terms of probation to the State Bar's Phoenix office;

(d) If respondent fulls to comply with any of the foregoing conditions, and information thereof is received by the State Bar, bar counsel shall file with the probable cause panelist a Notice of Non-Compliance. The probable cause panelist shall determine whether the conditions of probation have been breached and, if so, to order appropriate action and response to

such breach. If there is an allegation that respondent has fulled to comply with any of the foregoing conditions, the burden of proof thereof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.

(3) Pursuant to Rules 52(a)5 and 54(k)4, this order will be entered in the respondent's permanent record at the State Bar, and pursuant to Rule 61(a)(2), is not confidential. It may also be considered by a hearing officer or committee, the Disciplinary Commission or the Supreme Court in recommending or imposing discipline in a subsequent disciplinary proceeding against respondent.

IT IS FURTHER ORDERED, pursuant to Rule 52(a)(8), Ariz.R.S.Ct., that the costs and expenses of these proceedings in the sum of $300 are imposed against respondent, payable within twenty (20) days after receipt of this order.

DATED this 19 day of May, 1999.

s/Kirk v. Karman
Kirk v. Karman
Probable Cause Panelist
State Bar of Arizona

Copies mailed this 15th day
of June, 1999, to:

David J. Gilchrist
Attorney at Law
3523 Malina Place
Kihei, HI 96753-9240

Yigael M. Cohen
Director of Lawyer Regulation

111 West Monroe, Suite 1800
Phoenix, AZ 85003

by: s/Donna J. Westfall
JNS:dfw

FILED
SEP 01 1999
STATE BAR OF ARIZONA
BY s/Elena Farris

BEFORE THE PROBABLE CAUSE PANELIST

OF THE STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 98-1005
	)	Frederick &
David J. Gilchrist,	)	Judy Dieterle
Bar No. 011492	)	
	)	ORDER
	)	VACATING
Respondent.	)	INFORMAL
	)	REPRIMAND,
	)	PROBATION
	)	AND COSTS

The undersigned Probable Cause Panelist of the State Bar, having reviewed a request to vacate the Order of Informal Reprimand, Probation and Costs, concludes that the Order of Informal Reprimand, Probation and Costs entered in this matter on May 19, 1999 should be vacated for cause shown and in the interest of justice, pursuant to Rule 55(i), Ariz.R.S.Ct.

IS THEREFORE ORDERED that the Order of Informal Reprimand, Probation entered on May 19, 1999, is hereby vacated.

IT IS FURTHER ORDERED that a separate Order of Informal Reprimand, Probation and Costs be issued in this matter nunc pro tunc to May 19, 1999.

DATED this 1st day of September, 1999.

s/Nicholas Wallwork
Nicholas Wallwork
Probable Cause Panelist
State Bar of Arizona

Copies mailed this 2nd day of September, 1999, to:

David J. Gilchrist, Esq.
3523 Malina Place
Kihei, HI 96753-9240

by: s/J. Lundberg
JNS:jll

FILED
SEP 01 1999
STATE BAR OF ARIZONA
BY s/Elena Farris

BEFORE THE PROBABLE CAUSE PANELIST

OF THE STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 98-1005
	)	Frederick &
David J. Gilchrist, Bar No. 011492	)	Judy Dieterle
	)	
	)	ORDER OF
Respondent.	)	INFORMAL
	)	REPRIMAND,
	)	PROBATION
	)	AND COSTS
	)	(NUNC PRO
	)	TUNC)

The undersigned Probable Cause Panelist of the State Bar, having reviewed this matter pursuant to Rule 53(b), Ariz.R.S.Ct., finds that probable cause exists to believe that respondent has violated Rule 42, Ariz.R.S.Ct., to wit:

You and Mr. Dieterle signed a fee agreement which included a provision for a lien over the entire settlement of his claim. However, at the time the agreement was signed the amount of your legal fees was not quantifiable nor could you determine what, if any, settlement would be reached. Once your client's case settled you were entitled to a portion of that settlement; the portion equal to your actual fees. As you are undoubtedly aware, your client disputed the amount you ultimately claimed

as your fee. In an effort to secure your fee without addressing Mr. Dieterle's concerns, you orchestrated a plan which would prevent the client from ever receiving any portion of his funds without first paying your fee. By claiming a lien on the entire settlement, an amount which was ten times the amount of your fees, and preventing the distribution of any portion of those funds, you violated E.R. 1.15.

IT IS THEREFORE ORDERED that:

(1) Pursuant to Rules 52(a)(5) and 53(b), Ariz.R.S.Ct., respondent is informally reprimanded for such conduct.

(2) Pursuant to Rules 52(a)(6) and 53(b), Ariz.R.S.Ct., respondent is hereby placed on probation under the following terms and conditions:

(a) Respondent shall attend a one-day Ethics Enhancement Program. Respondent must contact Yigael M. Cohen, Director of Lawyer Regulation, State Bar of Arizona, (602) 340-7250, within 20 days from the date this order is mailed;

(b) The period of probation shall be in effect until such time as respondent has completed the one-day Ethics Enhancement Program.

(c) Respondent shall attend the Ethics Enhancement Program within nine (9) months from the original order of May 19, 1999.

(d) If respondent fails to comply with the foregoing conditions, or otherwise objects to any other terms of this order within 20 days of the date this order is mailed, this order will then be vacated and an order of probable cause shall be entered pursuant to Rule 53(b)5, Ariz.R.S.Ct.

(3) Pursuant to Rules 52(a)5 and 54(k)4, this order will be entered in the respondent's permanent record at the State Bar and, pursuant to Rule 61(a)(2), is not confidential. It may also be considered by a hearing officer or committee, the Disciplinary Commission or the Supreme Court in recommending or imposing discipline in a subsequent disciplinary proceeding against respondent.

IT IS FURTHER ORDERED, pursuant to Rule 52(a)(8), Ariz.R.S.Ct., that the costs and expenses of these proceedings in the sum of $300.00 are imposed against respondent, payable within twenty (20) days after receipt of this order. The State Bar of Arizona has previously received respondent's payment of $300.00.

THIS ORDER shall be entered *nunc pro tunc* to May 19, 1999.

DATED this 1st day of September, 1999.

s/Nicholas J. Wallwork
Nicholas Wallwork
Probable Cause Panelist
State Bar of Arizona

Copies mailed/hand-delivered this
2nd day of September, 1999, to:

David J. Gilchrist, Esq.
3523 Malina Place
Kihei, Hawaii 96753-9240

Yigael M. Cohen
Director of Lawyer Regulation
State Bar of Arizona
111 West Monroe, Suite 1800

Phoenix, Arizona 85003-1742
by s/ J. Lundberg
JNS:jll

FILED
Oct 29 10 22 AM '99
K. MIYAMURA
CLERK SUPREME COURT

NO. 22785
IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL,	)	CONFIDENTIAL
	)	ODC 9-330-6160
Petitioner,	)	
vs.	)	
DAVID J. GILCHRIST,	)	
Respondent.	)	

ORDER

Upon consideration of the Office of Disciplinary Counsel's ex parte petition for issuance of reciprocal discipline notice under Rule 2.15(b) of the Rules of the Supreme Court of the State of Hawai'i (RSCH), the memorandum, affidavits, and exhibits thereto, Respondent Gilchrist's response to our September 10, 1999 notice and order, and the record, it appears (1) that on May19, 1999, the State Bar of Arizona informally reprimanded Respondent David J. Gilchrist, and (2) RSCH 2.15(c) requires this court to impose the identical discipline upon the attorney unless this court finds .that upon the face of the record upon which the discipline is predicated it clearly appears that (i) the Arizona procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due

process, or (ii) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject, or (iii) the misconduct established warrants a substantially different discipline in this state. It further appears that based on the record before united States, there is no evidence that Respondent Gilchrist was ever in possession of property in which both he and another person claimed interests, as is required by E.R. 1.15 of the Arizona Rules of Professional Conduct and Rule 1.15(a), (c), and (f) of the Hawai'i Rules of Professional Conduct. Thus, we cannot, consistent with our duty, accept the Arizona Bar's conclusion that Respondent Gilchrist violated Arizona E.R. 1.15. Therefore, IT IS HEREBY ORDERED that the Office of Disciplinary Counsel's ex parte, petition is denied. pursuant to RSCH 2.15(c).

DATED: Honolulu, Hawai'i, October 29, 1999.

s/Ronald T.Y. Moon
RONALD T.Y. MOON
Chief Justice

s/Robert G. Klein
ROBERT G. KLEIN
Associate Justice

s/Steven H. Levinson
STEVEN H. LEVINSON
Associate Justice

s/Paula A. Nakayama
PAULA A. NAKAYAMA
Associate Justice

s/Mario R. Ramil
MARIO R. RAMIL
Associate Justice

CONSTITUTIONAL PROVISIONS

Article I § 10 of the Constitution of the United States provides in pertinent part:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

The First Amendment of the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws.

The United Nations' Universal Declaration of Human Rights includes the following provision:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Universal Declaration of Human Rights, Preamble and Article 11, § 2 (1948). *See also* Norway Constitution, Article 97 (17 May 1814); Luxembourg Constitution, Article 14 (17 Oct 1868); Finland Constitution, Section 6a (17 July 1919); Japan-Constitution, Article 39 (3 Nov 1946); South Korea Constitution, Article 13 (17 July 1948); Kuweit Constitution, Article 32 (11 Nov 1962); Constitution of the Republic of Singapore, Article 11, § 2 (16 September 1963); Yemen Constitution, Article 81 (13 March 1973); Syria Constitution, Article 30 (13 March 1973) Sweden Constitution, Article 10 (1 January 1975); Portugal Constitution, Article 18 (2 April 1976); Iran Constitution, Article 169 (24 Oct 1979); Brazil Constitution, Article XL (5 October 1988); Croatia Constitution, Article 31 (Dec 1990); New Zealand Bill of Rights Act 1990, (1990); Tunisia Constitution, Article 13, (1991); Macedonia Constitution, Article 52, § 4 (17 November 1991); Romania Constitution, Article 15 (8 December 1991); Slovenia Constitution, Article 155 (23 December 1991); Congo Constitution, Article 15 (15 March 1992); Yugoslavia Constitution, Article 117 § 1 (27 April 1992); Paraguay Constitution, Article 14 (20 June 1992);Estonia Constitution, Article 23 (28 June 1992); Madagascar Constitution, Article 13

(19 August 1992); Angola Constitution, Article 36 §§ 3-4 (25 August 1992); Constitution of the Russian Federation, Article 54 (12 December 1993); Armenia Constitution, Article 42 (5 July 1995).

STATUTES

42 U.S.C. § 1983 provides:

Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Ninth Circuit's Rule 36-3 provides:

CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

(a) Not Precedent : Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.

(b) Citation : Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy : A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.

The Arizona quasi-criminal statute known as E.R. 1.15 SAFEKEEPING PROPERTY provides:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept

in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The Arizona quasi-criminal law known as E.R. 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 54(l) of the Arizona Supreme Court provides:

> Immunity From Civil Suit. Communications to the court, state bar, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists or bar counsel relating to lawyer misconduct, lack of professionalism or disability and testimony given in the proceedings shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness. Members of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, monitors of the Membership Assistance or Law Office Management Assistance Programs, probable cause panelists, bar counsel and staff shall be immune from suit for any conduct in the course of their official duties.

Rule 54(l), Ariz.R.S.Ct. (Emphasis added).

PLEASE DON'T CITE THIS!

Why We Don't Allow Citation to Unpublished Opinions

By Alex Kozinski and Stephen Reinhardt

Like other courts of appeals, the Ninth Circuit issues two types of merits decisions: opinions and memorandum dispositions, the latter affectionately known as in memdispo. Opinions contain a full-blown discussion of legal issues and are certified for publication in the Federal Reporter. Once final, they are binding an all federal judges in the circuit- district, bankruptcy, magistrate, administrative, and appellate. Until superseded by an en banc or Supreme Court opinion, they are law of the circuit and may be cited freely; indeed, if they are directly on point, they must be cited.

The rule is different for memdispo. Pursuant to Ninth Circuit Rule 36-3, memdispo are not published in the Federal Reporter, nor do they have precedential value. Although memdispo can be found on Westlaw and Lexis, they may not be cited. So far as Ninth Circuit law is concerned, memdispo are a nullity.

Few procedural rules have generated as much can control as the rule prohibiting citation of memdispo. At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispo be citable. When we refuse, lawyers grumble that we just don't understand their problems.

In fact, it's the lawyers who don't understand our problems. Court of appeals judges perform two related but separate tasks. The first is error-correction: We review several thousand cases

every year to ensure that the law is applied correctly by the lower courts, as well as by the many administrative agencies whose decisions we review. The second is development of the circuit's law: We write opinions that announce new rules of law or extensions of existing rules.

Writing a memdispo is straightforward. After carefully reviewing the briefs and record, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.

Writing an opinion is much harder. The facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it is important to omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case before us yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule and rejecting others. We most also make sure that the new rule does not conflict with precedent or sweep beyond the questions fairly presented.

While a memdispo can often be prepared in a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing, revising. Frequently, this process brings to light new issues, calling for further research, which, in turn, may send the author back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and their clerks' time to cases in which they

write opinions, dissents, or concurrences.

Once an opinion is circulated, the judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions, or additions. It is quite common for judges to exchange lengthy memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of a memdispo is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers, and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about three-quarters of the published cases. Based on the petition and an independent review of the case, off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999 there were 44 en banc calls, 21 of which were successful.

Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda supporting or opposing the en banc call. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing, and the response thereto. The process can take months to complete.

If the case goes en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than a panel of three, hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4,500 cases on the merits, approximately 700 by opinion and 3,800 by memdispo. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions - 20 opinions and 130 memdispos - per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 memdispos circulated by other judges with whom we sat.

Writing 20 opinions a year is like writing a law review article every two and a half weeks, joining 40 opinions is akin to commenting extensively once a week or so on articles written by others. Just from the numbers, it's obvious that memdispos get written a lot faster than opinions- about one every other day. It is also obvious that explaining to the parties who wins, who loses, and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. Moreover, we seldom review the memdispos of other panels or take them en banc. Not worrying about making law in 3,800 memdispos frees us to concentrate on those dispositions that affect others besides the parties to the appeal - the published opinions.

If memdispo could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a

particular case might well be unacceptable if applied to future cases raising from different fact patterns. And, though three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, we would have to start treating the 130 memdispo for which we were responsible, and the 260 memdispo we receive from other judges, as mini-opinions. We would also have to pay much closer attention to the memdispo written by judges on other panels - at the rate of 10 a day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15 percent of the cases already and may well have to reduce that number. Or we could write opinions that are less carefully reasoned. Or spend less time keeping the law of the circuit consistent through the en banc process. Or reduce our memdispo to one-word judgement orders, as have other circuits. None of these are palatable alternatives, yet something would have to give.

Lawyers argue that we need not change our internal practices, that we should just keep doing what we're doing but let memdispo be cited as precedent. But what does precedent mean? Surely it suggests that the three judges on a panel subscribe not merely to the result but also to the phrasing of the disposition.

With memdispo, this is simply not true. Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our memdispo are in screening cases, which are prepared by our central staff. Every month, three judges meet

with the staff attorneys who present us with the briefs, records, and proposed memdispo in 100 to 150 screening cases. If we unanimously agree that a case can be resolved without oral argument, we make sure the results is correct, but we seldom edit the memdispo, much less rewrite it from scratch. Is it because the memdispo could not be improved by further judicial attention? No, it's because the result is what matters in those cases, not the precise wording of the disposition. Any refinements in language would cost valuable time yet make little difference to the parties. Using the language of a memdispo to predict how the court would decide a different case would be highly misleading.

We are a large court with many judges. Keeping the law of the circuit clear and consistent is a full-time job, even without having to worry about the thousands of unpublished dispositions we issue every year. Trying to extract from memdispo a precedential value that we didn't put into them may give some lawyers an undeserved advantage in a few cases, but it would also damage the court in important and permanent ways. Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citation of memdispo is an uncommonly bad idea. We urge lawyers to drop it once and for all.

Judge Reinhardt has served on the Ninth U.S. Circuit Court of Appeals since 1980, Judge Kozinski since 1985.

Alex Kozinski and Stephen Reinhardt, California Lawyer, June, 2000 (Emphasis added).

For Immediate Release
Contact: Matthew Silverman, Director of Communications
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Kirk v. Karman Takes Over Leadership of State Bar of Arizona
June 13, 2000 (Phoenix) - Kirk v. Karman, an attorney whose law practice serves people in Pinal County, is about to become the new President of the State Bar of Arizona. Karman's one-year term officially begins June 17, 2000 during the State Bar's annual convention.

As a sole practitioner, Karman runs The Karman Firm, where his legal practice focuses on family law, criminal law and civil litigation. The Karman name is well known throughout Pinal County where Kirk Karman and his father Howard have been practicing for more than 65 years, combined.

Kirk Karman is an active leader in the legal profession. His service on the State Bar Board of Governors dates back to 1992. He is currently Chair of the State Bar Personnel Committee and previously served as a Probable Cause Panelist in the State Bar's discipline system.

Mr. Karman is a former President of the Pinal County Bar Association (1986), served on the Board of Governors of the Arizona Association for Criminal Justice (1989-1990), was a member of the State Bar's Board of Legal Specialization (1988-1992) and also served as a Regional Coordinator of the 1986 Arizona High School Mock Trial Program.

Kirk learned some of his exceptional leadership abilities from his father. Howard Karman was President of the State Bar of Arizona from 1971 to 1972 and President of the Arizona Bar Foundation from 1984 to 1985. The Karman's are the third father-son team in State Bar history.

A Case Grande, Arizona native, Kirk Karman earned his law degree from the University of Arizona College of Law.

http://www.azbar.org/StateBarInfo/prsc.cfm?ReleaseID=35

. . .

"Being afraid to do the right thing because you want to get re-elected is a valid concern, but that is not always the best way to help this organization succeed." President Kirk v. Karman, Arizona Attorney, July 2000.

"This is where we are with MDP. If we stick our heads in the sand we will be late and have a big problem. In the future looking back, we will think MDP is a normal practice of law just like computers are a part of the practice of law now. If we don't get started, however, we will get left behind and someone else will offer these services. And, of course, I'm interested in lawyers being successful. That is what the State of Arizona is here for." President Kirk v. Karman Arizona Attorney, July 2000.

"I've always enjoyed criminal cases the most, probably because I get a chance to put on a show. I had a client who walked into a convenience store and fatally shot the store clerk. He confessed and was charged with first-degree murder. He was facing the death penalty. At trial, I got his confession suppressed and convinced the jury that he was not guilty. It took the jury only 12 minutes to leave the courtroom, go into the jury room, vote and return to the courtroom to announce the verdict." President Kirk v. Karman, Arizona Business Gazette, August 31, 2000.

"Being a lawyer has changed dramatically over the last 20 years.. . . The result is a deterioration of lawyer behavior and the public perception of lawyers." President Kirk v. Karman, Arizona Attorney, August/September 2000.

"[M]ost lawyers are aware that the State Bar of Arizona has improved its discipline system to the point that our system is the best in the nation." President Kirk v. Karman, Arizona Attorney, August/September 2000.

Media E-Center
For Immediate Release
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Nicholas J. Wallwork,
Leading Phoenix Lawyer,
To Become State Bar of Arizona President
June 08, 2001 (PHOENIX) – Nicholas J. Wallwork, managing shareholder of the Phoenix law firm Beshears Muchmore Wallwork, will become president of the State Bar of Arizona June 15 at the State Bar of Arizona's annual convention.

As president, Wallwork will oversee the State Bar's 29-member Board of Governors and work with the Arizona Supreme Court in establishing policies and procedures for the oversight of the legal profession in Arizona. One of the Bar's top priorities is promoting a just society under law and supporting attorneys so they can provide clients a strong voice in the justice system. Wallwork will use his leadership position to emphasize the profession's core values, including integrity, independence, professionalism and a commitment to clients.

Wallwork is highly regarded as a strong and capable leader, well-respected by both the bench and bar in Arizona. He has extensive professional experience in civil litigation, especially of complex and class action cases, including disputes involving technology and commercial matters. He also practices in environmental and toxic tort law and is past chair of the State Bar's Environmental & Natural Resources Law Section and editor in chief of the Arizona Environmental Law Manual.

Recognized for his expertise in technology law and the use of technology to manage complex legal matters, Wallwork has written and spoken extensively and served in numerous leadership positions in those areas. He is the founding Chair of

the State Bar of Arizona's Internet, E-commerce & Technology Law section, a longtime member of the State Bar's Technology Task Force and a past member of the Supreme Court's Commission on Technology.

Wallwork graduated from the University of Virginia School of Law. He has lived in Arizona since 1983 with his wife and two children.

http://www.azbar.org/StateBarInfo/prsc.cfm?ReleaseID=78

THE MAJESTY OF THE LAW, *circa* 1803

"Why does a judge swear to discharge his duties agreeably to the constitution of the United States if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."

"The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained."

Marbury v. Madison, 1 Cranch 137 (U.S. 1803).

THE MAJESTY OF THE LAW, *circa* 2003

"Because the court concludes that it has no jurisdiction to consider the plaintiff's claims, it is axiomatic that it may not reach the merits of any of the plaintiff's claims, including his federal constitutional claims." Appendix, p. 7, n. 3.

Paul G. Rosenblatt
federal judge
Sandra Day O'Connor Courthouse
District of Arizona

"He really served his country in amazing ways."
"He was a major figure in American history."

Sandra Day O'Connor
federal judge
United States Supreme Court
(on Chief Justice John Marshall)
BookTv, C-SPAN2, April 9, 2003.